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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 871

ROSE FINSKY, AVRUM ANDALMAN, JOSEPH M. ANDALMAN, LEE B. ANDALMAN, YETTA S. ANDALMAN and MAXWELL N. ANDALMAN, Co-Partners doing business under the name of SURPLEX SALES,

Petitioners,

vs.

UNION CARBIDE & CARBON CORPORATION, a New York Corporation, Owners and Operators of Division Thereof Known as HAYNES STELLITE CO.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petitioners (Plaintiffs below), Rose Finsky, Avrum N. Andalman, Joseph M. Andalman, Lee B. Andalman, Yetta S. Andalman and Maxwell N. Andalman, co-partners doing business as Surplex Sales, respectfully pray that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS OF THE COURTS BELOW

The Memorandum Opinion of the District Court was not published. It is set out (Rec. pp. 133-134) in the record here and is also set out in full in Appendix ff.

The Opinion of the United States Court of Appeals for the Seventh Circuit is reported in 249 F. (2nd) 449 and is set forth in Appendix ff.

JURISDICTION

The Judgment of the United States Court of Appeals for the Seventh Circuit was rendered on November 21, 1957 (Rec. 241) and petition for rehearing was filed in accordance with the Rules of the United States Court of Appeals for the Seventh Circuit. The Petition for Rehearing was denied on December 26, 1957 (Rec. 241).

The jurisdiction of this Court is invoked pursuant to Title 28 of the United States Code, Section 1254(1).

QUESTIONS PRESENTED

The following important questions are presented by this Petition:

I.

Are Petitioners, in particular, and the Public, in general, bound by a federal agency regulation, which was not published in the Federal Register, as required by Title 44 of United States Code, Sec. 301-310?

In 1954 the Ninth Circuit has held that such an unpublished regulation is not binding and is ineffective. (*Hotch* v. *U. S.*, 212 Fed. (2nd) 280.)

In 1957, the Seventh Circuit, in the case at bar, has held to the contrary (*Finsky et al.* v. *Union Carbide & Carbon Corp.*, 249 Fed. (2nd) 449), and this is in direct conflict with the decision of the Ninth Circuit in the *Hotch* case.

II.

Does any instrument, issued by an executive agency of the United States which purports "to transfer title or any other interest" in Government "surplus property" to a "bona fide" "transferee for value, and without notice of lack of compliance", constitute "conclusive evidence of compliance with the provisions of" Section 484(d) of Title 40 United States Code?

In 1949, the Ninth Circuit has held that such transferee's rights were invulnerable to attack. (*United States* v. *Jones*, 176 Fed. (2nd) 278.)

In 1957, the Seventh Circuit, in the case at bar, has held that such transferee's rights are vulnerable to attack (*Finsky et al.* v. *Union Carbide & Carbon Corp.*, 249 Fed. (2nd) 449), and this is in direct conflict with the Ninth Circuit decision in the *Jones* case.

III.

Is Strategic or Critical material in Government Surplus Termination Inventory (of which the United States has not taken possession) exempt from Stockpiling under Title 50 United States Code Section 98e (a)?

This is an important question of law never before decided by this Court. The Federal Statute, above cited, plainly states that it is exempt.

The Seventh Circuit, in the instant case, (*Finsky et al. v. Union Carbide & Carbon Corporation*, 249 Fed. (2nd) 449) has refused to give effect to this statutory provision.

This question ought to be settled by a decision of the Supreme Court of the United States for future guidance in business dealings with the United States Government.

STATUTES, REGULATION, AND CONSTITUTIONAL PROVISIONS INVOLVED:

(a) Title 44 United States Code, Sec. 301-310.

(b) Title 5 United States Code, Sec. 1001-1011.

(c) Title 40 United States Code, Sec. 484(d).

(d) Title 50 United States Code 98e(a).

(e) General Service Administration Emergency Procurement Regulation #1. (Unpublished)

(f) United States Constitution, Amendment V.

The above are reproduced in full in the Appendix ff.

STATEMENT OF THE CASE

Jurisdiction of the United States District Court for the Northern District of Illinois was based on diversity of citizenship and amount involved (Rec. 10).

This is an action to recover from respondent for its failure to deliver merchandise (Rec. 207) to petitioners pursuant to agreement (Rec. 18, 166, 170, 179, 203, 205, 206, 207).

Union Carbide & Carbon Corporation, respondent, in February of 1954 (Rec. 17, 157), advertised Government Contractor Termination Inventory for sale, requesting therein that bids be submitted by 5:00 P.M. February 23, 1954. The advertisements stated "Bids were subject to approval by the United States Government" (Rec. 17).

Such bids amounted to over $226,570.70 for certain of the advertised materials, including 173,000 pounds of tungsten powder (Rec. 18, 207). Petitioners, Surplex Sales, was advised that their bid was high and if the Government approved the bid, the merchandise would go to them (Rec. 11).

On March 5, 1954, petitioners were informed by the United States Ordnance Corps that their bid was high. (Rec. 12, 67, 161, 168, 175 ff). That same day, the Government approved Surplex Sales' bid, in writing, and authorized the respondent to sell to petitioners (Rec. 30, 51, 97, 101) and charged the amount of the petitioners' bid to respondent's account (Rec. 30, 51, 97, 101). The respondent admits this governmental instrument "purports to relate to the transfer" of the "interest of the Government" in this tungsten. (Rec. 51).

On March 6, 1954, petitioners' representatives met with respondent's representatives, at its plant. After petitioners there stated when and how they would pay the total

amount of their bid, and after one barrel was delivered to petitioners (Rec. 170) and payment on account was made, respondent then handed to petitioners the award in writing (Rec. 12, 35, 58, 59, 167 ff, 175 ff, 179).

Prior to delivery of the said barrel, a discussion was had about the making of payment. Respondent admits that in this discussion petitioners proposed that by March 11, 1954, they would pay one-half of the money to respondent and would accept one-third of the merchandise, and that by March 31, 1954, they would pay the other half and accept the balance of the merchandise (Rec. 162, 179). *It was immediately after this conversation that respondent delivered, then and there, to petitioners the letter showing that the property was awarded to them* (Rec. 35, 207).

Respondent admits that the government Contracting Officer, acting for the Department of the Army, did not reserve or request title to or possession of the tungsten for or by the Government at any time prior to the Government's approval, on March 5, 1954, of petitioners' bid (Rec. 52, 102, 157).

March 10, 1954, the respondent sent petitioners a letter quoting a telegram it had just received from the Contracting Officer directing it to "suspend delivery" to the petitioners and other bidders (Rec. 37, 209). The Contracting Officer who sent this telegram was the same one who had approved petitioners' bid, in writing, which writing had been delivered to the respondent on March 5, 1954, wherein he informed respondent that the amount of petitioners' bid was thereupon being charged against the respondent (Rec. 5, 30, 51, 97, 101).

Subsequent attempts by the petitioners to procure a hearing in the Ordnance Corps and in the General Services Administration were rebuffed with the written statement, in each department, that there was no privity of contract

between the petitioners and either the Department of the Army or the General Services Administration. (Rec. 60).

In the interim petitioners had learned that it was contended the Contracting Officers had violated some Regulation in not obtaining clearance from General Service Administration.

Then on April 14, 1954, respondent admitted that petitioners had had no prior knowledge that any Government Regulation had been violated and its representative said that after the suspension order had been received by him, it was he who had relayed that information (Rec. 70 ff) to petitioners.

Later it developed that the Regulation was unpublished and was issued as General Services Administration Emergency Procurement Regulation #1 and was directed, *not to the Public, but only* to "HEADS OF FEDERAL AGENCIES" (App. ff 33-37).

Respondent filed its Motion For a Summary Judgment (Rec. 26-27, 28 ff). Petitioners also moved for a Summary Judgment on *question of liability* (Rec. 54, 55 ff, 65 ff, 123 ff, 154 ff, 171 ff, 173 ff). On March 4, 1957 Summary Judgment was entered in favor of the respondent (Rec. 152) and Motion by Petitioners for a Summary Judgment on question of liability was denied.

Appeal was perfected to the Seventh Circuit. On November 21, 1957 the Court of Appeals Opinion and Judgment was filed affirming the Judgment of the District Court (Rec. 241). Petition for Rehearing was filed and an order entered on the 26th day of December, 1957, in which a rehearing was denied (Rec. 242).

REASONS FOR GRANTING THE WRIT

Very important questions of Federal law are involved herein:

I.

(a) Because the decision of the Court of Appeals for the Seventh Circuit disregards the Acts of Congress creating the Federal Register, (Title 44 Sec. 301-310) and nullifies Sec. 307 thereof, which provides that "no document required under Sec. 305 of this Title, to be published in the Federal Register shall be valid as against any person who has not had actual knowledge thereof until the duplicate originals or certified copies of the documents shall have been filed with the Division and a copy made available for public inspection as provided in Sec. 302 of this title."

(b) Because the United States Court of Appeals for the Seventh Circuit, in the instant case, has held that an unpublished Federal Agency regulation was binding upon the public in general and the petitioners in particular and this contravenes the Acts of Congress, Title 44 of the United States Code, Sec. 301-310, and is in direct conflict with the decision of the Ninth Circuit in *Hotch* v. *United States*, 212 Fed. (2nd) 280.

II.

(a) Because the decision of the Court of Appeals for the Seventh Circuit in the case at bar, violates the plain intent and meaning of subsection (d) of Section 484 of Title 40 United States Code. The said decision fails to recognize that this subsection, (which provides that any instrument executed by an executive agency "purporting to transfer title or any other interests in surplus property under this subchapter shall be conclusive evidence of compliance with the provisions of this subchapter insofar as concerns title

or other interests of any bona fide grantee or transferee for value and without notice of lack of such compliance") constitutes an exception as provided in sub-section (a) and creates a rule of substantive law.

(b) Because the decision of the Seventh Circuit in the case at bar is in direct conflict with the decision of the Ninth Circuit in *United States* v. *Jones*, 176 F. (2) 278.

III.

(a) Because Strategic or Critical Material in Government Surplus Contractor Termination Inventory which has not been taken possession of by the Government is exempt from stockpiling under Title 50 United States Code, Sec. 98e, Subsection (a).

(b) Because the decision of the Court of Appeals in the instant case is in direct conflict with the simple, plain and explicit language of said subsection (a), Sec. 98e.

(c) Because the decision of the Court of Appeals for the Seventh Circuit deals with an important question of law, never before decided by this court. This ought to be settled by the United States Supreme Court for the future guidance of all Governmental agencies, and for the public doing business with Governmental Agencies involving Government Surplus property and contractor termination inventory.

ARGUMENT.

The Federal Register Act is set out in Title 44 of the United States Code at page 6453, Sec. 301-310. As stated by the United States Court of Appeals for the Ninth Circuit in *Hotch* v. *United States,* 212 Fed. (2nd) 280, at 283 this act is "more than a mere recording Statute whose function is solely to give constructive notice to persons who do not have actual notice of certain agency rules. The acts set up the procedure which must be followed in order for agency ruling to be given the force of law. *Unless the prescribed procedures are complied with, the agency (or administrative) rule has not been legally issued, and consequently it is ineffective.*" (Emphasis ours). At page 284 of that opinion it is said, "We hold that since neither the proposed regulations nor the regulation itself in the instant case were ever published, the regulation is not valid, whether or not appellant had actual notice of its contents."

It is also there stated, page 281, that "Sec. 5-(a) of the Federal Register Act, Title 44 United States Code, para. 305, requires the publication in the Federal Register of • • • such • • • classes of documents as may be required to be published by acts of Congress. Any such document which is not duly published is invalid. In 1946 Congress enacted the Administrative Procedure Act, 60 Stat. 237, 5 United States Code Annot. Sec. 1001 *et seq.*" describing certain classes of documents which it required to be published. "Sec. 4 (a) of the Administrative Procedure Act, Title 5 U.S.C.A. par. 1003 (a) requires that 'general notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) • • •' ".

And, Sec. 3(a) (3) Title 5 U.S.C.A. par. 1002 (a) (3) requires that:

> "Every agency shall separately state and currently publish in the Federal Register * * * substantive rules adopted as authorized by law * * *".

This *Hotch* decision then proceeds to quote and point out the report of the House of Representatives Committee on the judiciary in support of its decision. This decision gives complete and full recognition to the fact that congressional directive must be followed in the issuance of agency regulations and must be strictly complied with because such regulations are an exercise of delegated legislative power. In the instant case the *Court of Appeals* for the Seventh Circuit *concedes* that General Services Administration Emergency *Regulation No.* 1 *was not published.*

It is conceded that the Government Contracting Officer in the instant case directed the contractor (respondent herein) to proceed to receive bids for the property in question, and to sell same. This was done.

We have here a clear cut case where the United States did not take possession of surplus contractor termination inventory.

Under these circumstances, there is applicable Sub-Sec. (a) of Section 98e of Title 50 of the United States Code, wherein it is plainly stated "there shall be exempt from this requirement [stockpiling] (1) any material which constitutes contractor inventory *if the owning agency shall not have taken possession of such inventory*)". (Emphasis ours) (Title 50 p. 7338 United States Code Sec. 98e (a)).

The decision of the Court of Appeals in the instant case is in direct conflict with the Statute which is designed to

cover all cases of the kind and character here and now under consideration. This conflict poses an important question of law never before decided by this court, and we respectfully submit that this court ought to clarify the law.

There must also be considered that the exception appearing as sub-section (d) of Section 484 of Chap. 10, Title 40, of the United States Code protects the Petitioners in that, among other things, there had been issued an "instrument executed by or on behalf" of an "executive agency purporting to transfer title or *any other interest* in surplus property" to Petitioners "under this subchapter". (Emphasis ours.)

The further provision of such exception that such instrument "shall be conclusive evidence of compliance with the provisions of this subchapter insofar as concerns title or other interest of any *bona fide* * * * transferee for value and without notice of lack of compliance" constitutes full and complete protection to petitioners. *It is conceded that Petitioners are bona fide transferees.*

The case of *United States* v. *Jones*, 176 Fed. (2) 278 at 288, 289 and 290 determined that the exception above discussed was full and complete protection to *bona fide* purchasers, and that instruments executed by executive agencies transferring Government interests are conclusive, and that the conclusiveness established by the Act of Congress *declares a rule of substantive law.* At page 290 of this decision the United States Court of Appeals for the Ninth Circuit said:

> "We are, therefore, of opinion that the Government cannot impeach the unrecallable conclusiveness of the sales memoranda and bills of sales given to Jones by persons acting for the Maritime Commission and the War Assets Administration * * *".

The approval of the bid of Petitioners, coupled with the charging of the account of Respondent by the executive agency, is the final "other instrument" which was issued by the Contracting Officer to divest the United States Government of all right to the property and simultaneously invested the Petitioners with the right to complete its transaction with the Respondent.

By Governmental action Petitioners were deprived of their property rights, and their property was thereby confiscated by the United States Government in violation of their rights under the Fifth Amendment to the Constitution.

CONCLUSION.

This case presents to this Honorable Court three matters of law of transcending importance:

(1) There is present herein a conflict between the decision of the Seventh Circuit United States Court of Appeals in the instant case and the decision of the Ninth Circuit United States Court of Appeals in *Hotch* v. *United States*, 212 Fed. (2) 280 (a. d. 1954). The approval of the bid of Petitioners, coupled with the charging of the account of Respondent by the Executive Agency, was the final "other instrument" which was issued by its contracting officer. These elements, in the one instrument, combine to divest the United States Government of all right to the property in question. Simultaneously, the same instrument invests the Petitioners with every right to complete its transaction with the Respondent.

The point of conflict concerns whether or not an unpublished United States Agency Regulation can bind the public under the Federal Register Act.

(2) There is also present herein a conflict between the decision of the Seventh Circuit United States Court of

Appeals in the instant case and the decision of the Ninth Circuit United States Court of Appeals in *United States* v. *Jones*, 176 Fed. (2) 278 (a. d. 1949).

The point of conflict concerns whether or not subsection (d) of Sec. 484, of subchapter II of Title 40, United States Code, affords complete protection to a bona fide transferee without notice of lack of compliance by an Executive Agency with the provisions of subchapter II.

(3) There is also present herein an important question of Federal law which has never been, but should be decided by this court.

This question is whether or not the Statute, Subsection (a) of Sec. 98e, of Chapter 5, of Title 50, United States Code, "exempts" from stockpiling, as Strategic or Critical Material, Contractor Surplus Termination Inventory which has not been taken possession of by the Government (prior to execution of an instrument purporting to transfer title or any other interest to a bona fide transferee).

For the reasons herein contained we respectfully submit that the Writ of Certiorari ought to be granted.

Respectfully submitted,

AVRUM N. ANDALMAN and
HARRY G. FINS,
Attorneys for Rose Finsky, Avrum N. Andalman, Joseph M. Andalman, Lee B. Andalman, Maxwell N. Andalman and Yetta S. Andalman, co-partners doing business as Surplex Sales,
Petitioners.

Certificate of Service.

I, Avrum N. Andalman, one of the attorneys for petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on March 20, 1958 I served Five (5) copies of the foregoing Petition for Writ of Certiorari on Respondent's attorney of record Robert Tieken, United States Court House, South East corner of Clark and Adams Street, Chicago, Illinois, by depositing them in the United States Mail Box in Lobby of 33 N. LaSalle Street, Chicago 2, Illinois in a package addressed to him to which first class postage prepaid and which was attached thereto.

March 20, 1958.

AVRUM N. ANDALMAN
One of the attorneys for
Petitioners.

This Opinion Filed Nov. 21, 1957. Petition for Rehearing Denied Dec. 26, 1957.

APPENDIX I.

In the

United States Court of Appeals

For the Seventh Circuit

No. 12053 SEPTEMBER TERM, 1957, SEPTEMBER SESSION, 1957.

ROSE FINSKY, et al.[1]
Plaintiffs-Appellants,
v.
UNION CARBIDE & CARBON CORP., a New York corporation, owners and operators of a division thereof known as Haynes Stellite Co.,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

November 21, 1957

Before DUFFY, *Chief Judge*, SCHNACKENBERG and HASTINGS, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* Plaintiffs appeal from a summary judgment in favor of defendant, entered on defendants' motion, which judgment also denied plaintiffs motion for summary judgment.

[1] Avrum Andalman, Joseph M. Andalman, Lee B. Andalman, Yetta S. Andalman and Maxwell N. Andalman, co-partners, doing business under the name of Surplex Sales.

Plaintiffs filed a complaint in what they state is an action for damages for breach of a contract of sale, involving certain tungsten powder[2] and other materials.

Defendant's answer to the complaint, as later amended,[3] set up, among affirmative defenses, that title to the tungsten was in the federal government, and any prospective sale of the said tungsten was subject to the applicable United States statutes and regulations, and that plaintiffs at no time ever acquired a valid title or claim to the said tungsten.

The case was submitted on the motions for summary judgment and the pleadings, requests for admissions, responses to requests for admissions, affidavits, depositions and exhibits in support thereof. Therefrom appear the following relevant facts:

Defendant's Haynes Stellite division[4] entered into Department of Defense contracts for production of an item for Army Ordnance. To perform these contracts, defendant bought about 972,000 lbs. of tungsten all but 173,205 lbs. of which was used in the production for Army Ordnance.

A certain provision contained in each of these contracts is, in part:

"(b) Upon the making of any partial payment under this contract, title to all parts, materials, inventories,

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[2] Hereinafter sometimes called "tungsten".

[3] Count I alleges a breach of contract and seeks damages, Count II asks for a declaratory judgment and specific performance, Count III prays for a declaratory judgment and damages, and Count IV asks for money had and received and seeks recovery of $1,054,745.39 allegedly paid defendant by United States (hereinafter referred as to "the government") for tungsten to which plaintiffs claim they are entitled, plus interest.

[4] Sometimes referred to herein as "Haynes Stellite".

> • • • therefore acquired or produced by the Contractor for the performance of this contract, • • • shall forthwith vest in the Government; • • •."

Another provision contained in each of these contracts provided for termination of the contract for the convenience of the government upon notice to the contractor. Also provided therein was the obligation of the contractor to use its best efforts to sell, in the manner, at the time, to the extent, and at the price or prices directed or authorized by the government contracting officer, all such material produced as a part of, or acquired in connection with the performance of the work terminated by the notice.

Specifically there were the following provisions:

> "• • • Provided, that after receipt of notice of termination, any such property that is a part of termination inventory may be acquired or disposed of only in accordance with the provisions of the clause of this contract entitled Termination for Convenience of Government and applicable laws and regulations. • • •"

and

> "(b) After receipt of a Notice of Termination, and except as otherwise directed by the Contracting Officer, the Contractor shall • • • (6) transfer title and deliver to the Government, • • • (i) • • • material produced as a part of, or acquired in connection with the performance of the work terminated by the Notice of Termination, • • •."

Prior to March 9, 1953, the government made partial payments, under these contracts, of over $3,000,000. All of the tungsten acquired thereunder was physically segregated. The tungsten under the said government contracts was also segregated in its use and in records in regard thereto.

Prior to completion of these contracts, the government contracting officer, Henry C. Laskin, served upon defendant notice that the government, effective March 11, 1953, terminated these contracts for its convenience. Thereafter,

Laskin directed defendant to dispose of all materials acquired by defendant under these contracts, including the 173,000 pounds of tungsten, to advertise for and solicit bids for the sale thereof, and to sell, to the high bidder, with the approval of the United States government, all such materials.

Early in February 1954 defendant advertised three times in the Waste Trade Journal, soliciting bids for the 173,000-odd pounds of tungsten, among other items. This advertisement appeared under a bold face caption reading "GOVERNMENT CONTRACT CANCELLATION." The advertisement further stated, "The Government reserves the right to reject any and all bids. Terms Cash, F.O.B. Kokomo plant." Plaintiffs saw this advertisement.

February 11, 1954, Haynes Stellite wrote a letter to Surplex Sales inviting bids on all the materials listed in the advertisement. This letter in part provided, "Terms of payment will be our option. (Cashier's check, certified check, or sight draft)."

February 23, 1954, plaintiffs submitted their bid on the tungsten among other items, expressly pursuant to the advertisement and the letter. This bid, in part, stated, "Terms of payment per your letter at your option."

Haynes Stellite advised plaintiffs that Surplex Sales was high bidder on the tungsten "and that report would be made to the government and the plaintiffs would be notified orally and in writing if their bids were approved by the United States Government."

March 4, 1954, plaintiff Joseph Andalman telephoned New York Ordnance where the bid was subject to approval. He called again on March 5, 1954 and was told that plaintiffs' bid was approved. He and plaintiff Maxwell Andalman the next day went to Kokomo, Indiana, where the tungsten was stored, and met with the Haynes

Stellite office manager. Here they gave him a check for one barrel of the tungsten, and commented that they needed it for use as sales samples. At the same time the office manager handed them a letter stating that they had been awarded the tungsten in accordance with their February 23 bid. Plaintiffs later received written notification from New York Ordnance confirming acceptance. Laskin and the Army Board of Awards approved the bid without submitting or offering the tungsten to the General Services Administration, which gave no release or authorization for the sale.

March 10, 1954, New York Ordnance wired Haynes Stellite, in substance, that the sale of tungsten to Surplex Sales was "suspended," and that "no deliveries are to be made whatsoever pending further instructions." Defendant notified plaintiffs thereof the same day.

By letter dated March 17, 1954, Laskin directed defendant to turn over to the government, in accordance with forthcoming shipping instructions, the tungsten in question, giving as a reason that General Services Administration had not approved the disposition of the property to plaintiffs, that it was being stock-piled by the government and the interests of national defense required that it be delivered to the government and the aforesaid approved disposition (to plaintiffs) canceled or rescinded. The material was thereupon delivered to the government.

Defendant, which in this litigation is represented by government attorneys, argues that the parties in this case are presumed to have assented to applicable federal law existing at the time they entered into their contract, which prohibited the sale of the tungsten powder and directed it to be stockpiled as material strategic and critical to the national defense and that defendant's performance of the contract with plaintiffs was therefore excused.

To meet this argument, plaintiffs say that defendant is attempting to go behind the sale to show what the government did and did not do prior to refusing to take possession and title and ordering the property sold, defenses which (they say) actually have no place in this case and require no reply by them. Be that as it may, plaintiffs argue that these defenses are overcome by the law. They contend that a federal act (40 U.S.C.A. § 484, *et seq.*) basically underlies the sale of government surplus and contract termination inventory and that § 484 (d) thereof made the routine acceptance and approval of plaintiffs' bid, on which the written award in this case was based, conclusive evidence of compliance with the law insofar as it concerns their title as purchasers. Plaintiffs further contend that the army could have taken possession, if it saw fit to do so, when it terminated the "classified" contract with defendant. The contract gave the government that right and option, but not having exercised such right and option, the material became exempt and saleable free of governmental interest.

We shall now consider all acts of congress and all directives, orders and regulations, bearing upon the respective contentions of the parties. We shall quote only relevant parts thereof.

By 40 U.S.C.A. ch. 10, § 471 *et seq.*' Management and Disposal of Government Property,[5] provision is made, *inter alia*, for the disposal of government surplus property.

Definitions in § 472 include:

> "(a) The term 'executive agency' means any executive department or independent establishment in the executive branch of the Government, * * *."

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[5] Which we shall sometimes refer to as "Government Property act."

"(c) The term 'Administrator' means the Administrator of General Services[6] • • • ."

"(e) The term 'excess property' means any property under the control of any Federal agency which is not required for its needs and the discharge of its responsibilities, as determined by the head thereof."

"(g) The term 'surplus property' means any excess property not required for the needs and the discharge of the responsibilities of all Federal agencies, as determined by the Administrator."

"(k) The term 'contractor inventory' means (1) • • • and (2) any property which the Government is obligated to take over under any type of contract as a result • • • of the termination of such contract • • • prior to completion of the work, for the convenience or at the option of the Government."

Section 483 reads, in part:

"**Property utilization—(a) Policies and methods**

In order to minimize expenditures for property, the Administrator shall prescribe policies and methods to promote the maximum utilization of excess property by executive agencies, and he shall provide for the transfer of excess property among Federal agencies.

Duties of executive agencies

(b) Each executive agency shall • • • (2) continuously survey property under its control to determine which is excess property, and promptly report such property to the Administrator, (3) perform the care and handling of such excess property, and (4) transfer

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[6] The General Services Administration was established June 30, 1949 by act of Congress, 5 U.S.C.A. §630, 1956 Annual Pocket Part 127, which reads, in part:

"**General Services Administration—Establishment** (a) There is established an agency in the executive branch of the Government which shall be known as the General Services Administration.

Administrator of General Services; appointment (b) There shall be at the head of the General Services Administration an Administrator of General Services • • • ."

or dispose of such property as promptly as possible in accordance with authority delegated and regulations prescribed by the Administrator.

Transfers between departments of Department of Defense

(d) * * * excess property of one of the departments of the Department of Defense may be transferred to another department thereof.

Transfer of excess property

(e) Transfers of excess property between Federal agencies * * * shall be at the fair value thereof, as determined by, or pursuant to regulations of, the Administrator * * *."[7]

Section 484 provides:

"**Disposal of surplus property—(a) Supervision and direction**

Except as otherwise provided in this section, the Administrator shall have supervision and direction over the disposition of surplus property. * * *

Care and handling

(b) The care and handling of surplus property, pending its disposition, and the disposal of surplus property, may be performed by the General Services Administration or, when so determined by the Administrator, by the executive agency in possession thereof or by any other executive agency consenting thereto.

Method of disposition

(c) Any executive agency designated or authorized by the Administrator to dispose of surplus property may do so by sale, exchange, lease, permit, or transfer, for cash, credit, or other property, with or without warranty, and upon such other terms and conditions as the Administrator deems proper, and it may execute such documents for the transfer of title or

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[7] While the tungsten became excess property on March 11, 1953, no one contends that it was thereafter transferred between departments of the Department of Defense, or between fedral agencies as was permissible under §483 (d) and (e).

other interest in property and take such other action as it deems necessary or proper to dispose of such property under the provisions of this title.

Validity of deed, bill of sale, lease, etc.

(d) A deed, bill of sale, lease, or other instrument executed by or on behalf of any executive agency purporting to transfer title or any other interest in surplus property under this subchapter shall be conclusive evidence of compliance with the provisions of this subchapter insofar as concerns title or other interest of any bona fide grantee or transferee for value and without notice of lack of such compliance.

* * *

Contractor inventories

(f) Subject to regulations of the Administrator, any executive agency may authorize any contractor with such agency or subcontractor thereunder to retain or dispose of any contractor inventory.

* * *"

Section 486 reads as follows:

"**Policies, regulations, and delegations—(a) Promulgation by President**

The President may prescribe such policies and directives,[8] not inconsistent with the provisions of this chapter, chapter 11B of Title 5, chapter 4 of Title 41, and chapter 11 of Title 44, as he shall deem neces-

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[8] The President directed the Administrator of General Services to make a study and a determination of the centralization in General Services Administration to be attained in the performance of the functions involved in the June 30, 1949 Federal Property act, and he directed that thereupon "the Administrator shall prescribe such regulations as may be necessary to implement the determination resulting from such studies and surveys." The President further directed that the various executive agencies "shall, insofar as practicable, procure, utilize and dispose of property in accordance with the provisions of the Act [said chapters] and the regulations issued thereunder in order that the greatest overall efficiency and economy may be effected."

sary to effectuate the provisions of said chapters, which policies and directives shall govern the Administrator and executive agencies in carrying out their respective functions hereunder.

• • •

Regulations by Administrator

(c) The Administrator shall prescribe such regulations as he deems necessary to effectuate his functions under this chapter, chapter 11B of Title 5, chapter 4 of Title 41, and chapter 11 of Title 44, and the head of each executive agency shall cause to be issued such orders and directives as such head deems necessary to carry out such regulations.

• • •"

Section 487 (a) reads thus:

"**Surveys of Government property and property management practices; utilization of uniform catalog system and standardized purchase specifications; audit**

(a) • • • the Administrator is authorized (1) to make surveys of Government property and property management practices and obtain reports thereon from executive agencies; (2) to cooperate with executive agencies in the establishment of reasonable inventory levels for property stocked by them and from time to time report any excessive stocking to the Congress and to the Director of the Bureau of the Budget; • • •"

By section 492 the Administrator is required to make reports to Congress.

What is known as the "Strategic and Critical Materials Stockpiling Act", 50 U.S.C.A. 98, *et seq.*[9] contains, *inter alia*, the following provisions:

"**Declaration of policy**

The natural resources of the United States in certain strategic and critical materials being deficient or insufficiently developed to supply the industrial, mili-

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[9] Which we shall sometimes refer to as "Strategic Materials act".

tary, and naval needs of the country for common defense, it is the policy of the Congress and the purpose and intent of sections 98-98h of this title to provide for the acquisition and retention of stocks of these materials and to encourage the conservation and development of sources of these materials within the United States, and thereby decrease and prevent wherever possible a dangerous and costly dependence of the United States upon foreign nations for supplies of these materials in times of national emergency."

Section 98a, as amended July 26, 1947,[10] provides in part:

"**Strategic and critical materials; determination; quanitity and quality to be purchased; formation and functions of industry advisory committees; subsistence and traveling expenses of members**

(a) To effectuate the policy set forth in section 98 of this title the Secretary of the Army, the Secretary of the Navy, and the Secretary of the Interior, acting jointly through the agency of the Army and Navy Munitions Board, are[11] authorized and directed to determine, from time to time, which materials are strategic and critical under the provisions of section 98-98h of this title and to determine, from time to time the quality and quantities of such materials which shall be stockpiled under the provisions of said sections. * * *",

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[10] See Ch. 343, Title II §213, 61 Stat. 505.

[11] All functions under section 98 **et seq.** of this title vested in the Secretaries of the Army, Navy, Air Force, and Interior or in any of them or in any combination of them, including the functions vested in the Army and Navy Munitions Board by section 98e (2) of this title, but excluding the functions vested in the Secretary of the Interior by section 98f of this title, were transferred to the Director of the Office of Defense Mobilization by 1953 Reorg. Plan No. 3 §2(b), eff. June 12, 1953, 18 F.R. 3375, 67 Stat. 634.

Section 98b reads, in part:

"**Purchase, storage, refinement, rotation, and disposal of materials**

The Secretary of the Army and the Secretary of the Navy[11] shall direct the Administrator of General Services to—* * * (e) dispose of any materials held pursuant to sections 98-98h of this title which are no longer needed because of any revised determination made pursuant to section 98a of this title, as hereinafter provided. * * * *Provided*, That no material constituting a part of the stock piles may be disposed of without the express approval of the Congress except where the revised determination is by reason of obsolescence of that material for use in time of war. * * *."

Section 98e reads in part as follows:

"**Transfer of surplus materials to stock piles; exceptions; * * ***

(a) Pursuant to regulations issued by the General Services Administration, every material determined to be strategic and critical pursuant to section 98a of this title, which is owned or contracted for by the United States or any agency thereof, * * * shall be transferred by the owning agency, * * * to the stock piles established pursuant to sections 98-98h of this title, * * *. There shall also be exempt from the requirement (1) any material which constitutes contractor inventory if the owning agency shall not have taken possession of such inventory, * * *."

General Services Administration by Emergency Procurement Regulation No. 1, dated August 14, 1951, and Supplements No. 1 and No. 2,[12] all of which were in effect during the year 1954, provided, in part:

"1. *Purpose.* This Regulation prescribes the policy and general methods for the transfer of excess strategic and critical materials to the stock pile. It is

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[12] As a group hereinafter referred to as regulation No. 1.

issued pursuant to the provisions of the Strategic and Critical Materials Stock Piling Act (60 Stat. 596; 50 U.S.C. 98-98h), and the Federal Property and Administrative Services Act of 1949, as amended (Public Laws 152 and 754, 81st Congress),[13] and in cooperation with the Munitions Board of the Department of Defense."

"2. *Definitions.*

* * *

b. 'Contractor inventory' means (1) * ** and (2) any property which the Government is obligated or has the option to take over under any type of contract as a result * * * of the termination of such contract * * * prior to completion of the work, for the convenience or at the option of the Government.

c. 'Excess,' with respect to strategic materials, means any such property under the control of any agency which is not required for its needs and the discharge of its responsibilities, as determined by the head thereof.

d. 'Holding agency' means any agency having accountability for strategic materials.

e. 'Strategic materials' means material determined to be strategic and critical by the Munitions Board pursuant to the Strategic and Critical Materials Stock Piling Act, a list of such materials being appended hereto as Appendix A."

"3. * * *

c. *Form of Reports.* Holding agencies shall file reports of excess strategic materials with the Administration * * *.

d. *Contractor Inventory.* Each agency having strategic materials in contractor inventory which are determined to be excess to the needs of the agency, shall report such materials in the manner prescribed by this Regulation. * * * When after reporting such property, the strategic materials are determined suitable for stock piling, the contracting

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[13] 40 U.S.C.A. 471, *et seq.*

agency shall take the necessary action to acquire title for the Government and shall transfer such property to the General Services Administration for stock piling, in accordance with Section 4 of this Regulation."

"4. *Transfers to the Stock Pile.*

a. *General.* Excess strategic materials reported to the Administration, which are determined by the Administration to be suitable for stock piling, shall be transferred to the General Services Administration for stock piling in accordance with this Regulation.

b. *Unsuitable Items.* Excess strategic materials reported to the Administration which are determined by the Administration to be unsuitable for stock piling or which cannot economically be converted to meet stock pile requirements shall, after notification of such determination, be reported and disposed of in accordance with the provisions of General Services Administration Personal Property Management Regulation No. 3, Revised."

• • •

"APPENDIX A
LIST OF STRATEGIC AND CRITICAL MATERIALS

• • •

"Tungsten	Ores, concentrates, ferro, powder metal, oxide.	10,000 pounds"

• • •

Congress has placed upon the General Services Administration a function, which has two prongs, one derived from the Government Property act and the other from the Strategic Materials act. The former serves the principal purpose of efficiency and economy;[14] the latter, the

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[14] 40 U.S.C.A. §471:

"It is the intent of the Congress in enacting this legislation to provide for the Government an economical and efficient system for • • • (b) the utilization of available property; (c) the disposal of surplus property; • • •."

common defense.[15] Each is complete and independent of the other. The existence of this responsibility, being embedded in statutory law, all persons are bound to recognize the function of the General Services Administration when dealing in the respective areas covered by those two acts of Congress.[16] Where the approval of that admininistration is required, no error, oversight or mistake by anyone can excuse an omission to obtain it. Without its approval of the disposition of government property subject to said statutes, a red light is set preventing a consummation of any such transaction. Only by the procurement of such approval can such a transaction, if otherwise lawful, proceed on a green-light to consummation.

The Government Property Act.

The legislative history makes it clear that it was the congressional intent, in enacting the Government Property

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[15] 50 U.S.C.A. §98:

"The natural resources of the United States in certain strategic and critical materials being deficient or insufficiently developed to supply the industrial, military, and naval needs of the country for common defense, it is the policy of Congress * * * to provide for the acquisition and retention of stocks of these materials * * *."

[16] **United States v. Jones**, 176 F. 2d 278, is heavily relied upon by plaintiffs. It is significant that in that case the court, at 281, said:

"* * * a public officer, in exercising powers conferred upon him by statute and regulation, is bound to follow the mode or manner prescribed. One who deals with such official is on his notice of possible limitations of authority. And no estoppel can arise against the Government from the performance of unauthorized acts or from authority exercised in a manner forbidden." (Citing cases.)

act, to deal with the most important phase of property management, which is continuing use by the government of the government's property, and the disposal of its surplus property. See House Committee Report, U.S. Code Congressional Service (1949), 1475, 1476, 1478, 1487 and 1488.

The act places upon the Administrator a duty to determine what excess property shall constitute surplus property, § 472 (g), and a duty to provide for the transfer of excess property among federal agencies, § 483 (a). The act requires prompt reports of excess property by each executive agency to the Administrator and the transfer or disposal thereof in accordance with authority delegated and regulations prescribed by the Administrator, § 483 (b).

A general power of supervision and direction over the disposition of surplus property is vested in the Adiministractor, § 484 (a). In fact, the disposal of surplus property may be performed by the Administrator, or, when so determined by him, by the executive agencies in possession thereof or by any other executive agency consenting thereto, § 484 (b).

By § 484 (c) any executive agency designated by the Administrator may dispose of surplus property upon such terms and conditions as the Administrator deems proper.

Subject to the Administrator's regulations, any executive agency may authorize any contractor with it to retain or dispose of any contractor inventory, § 484 (f).

Section 486 (c) empowers the Administrator to prescribe regulations to effectuate his functions, and directs the head of each executive agency to issue orders to carry out such regulations. In addition, § 487 (a) authorizes the Administrator to report any excessive stocking of property to the Congress and the Director of the Bureau of the Budget.

In this court, the keystone in plaintiffs' case is § 484 (d), which reads:

> "A deed, bill of sale, lease, or other instrument executed by or on behalf of any executive agency purporting to transfer title or any other interest in *surplus* property under this subchapter shall be conclusive evidence of compliance with the provisions of this subchapter insofar as concerns title or other interest of any bona fide grantee or transferee for value and without notice of lack of such compliance." (Emphasis supplied.)

When the army's New York Ordnance suspended the sale to plaintiffs, one barrel of tungsten had been delivered to them, for which they paid cash. They never paid or tendered any part of the purchase price on the balance of tungsten which they had agreed to buy. The circumstances under which they made their bid show that they knew they were dealing with material subject to government contract cancellation, and that the terms of their bid were cash, f.o.b. defendant's plant. They were specifically informed in Haynes Stellite's letter soliciting bids that the terms of payment would, at the option of Haynes Stellite, be cashier's check, certified check or sight draft (which is equivalent to cash). Their bid expressly accepted these terms of payment.

Burns Indiana Statutes (1951), § 58—202, (relied upon by plaintiffs) is as follows:

> "**Property in specific goods passes when parties so intend.—**
>
> (1) Where there is a contract to sell specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.
>
> (2) For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, usages of trade and the circumstances of the case."

The circumstances above set forth indicate that the parties to the contract intended that the title to the tungsten would be transferred to plaintiffs at Kokomo, Indiana, when they paid for it. Therefore, when Laskin called the attention of defendant to the fact that General Services Administration had not approved the disposition of the property to plaintiff, which fact required that the sale to plaintiffs be canceled, the contract between defendant and plaintiffs was still unconsummated and no title had passed, except as to one barrel of tungsten. Inasmuch as there never was a time, prior to the government's intervention, when the parties to the contract intended the property in the tungsten to be transferred to plaintiffs and there never was any instrument executed purporting to transfer the title, § 484 (d) does not sustain plaintiffs' position.

It will be noted that § 484 (d) of the Government Property act, upon which plaintiffs rely, limits its application to *surplus property* under *that* act. Having thus taken the position that they are buying surplus property, plaintiffs are unable to point to any action by the Administrator directing or supervising the sale of the tungsten to them, as required by § 484 (a), nor can they show that this surplus property was disposed of by the Administrator or by an executive agency which the Administrator determined should so dispose of it, as provided in § 484 (b). Moreover, inasmuch as § 484 (f) deals with the disposal of property constituting a part of a contractor inventory, plaintiffs point to no regulation of the Administrator under which the sale herein relied upon by plaintiffs was made.

The tungsten in this case was contractor inventory. By virtue of the partial payments clause of the contracts between the government and defendant, title to it was in the government. Even if title was not in the government,

under termination clauses of the contracts the government had an option to take title, so that the tungsten was nevertheless "contractor inventory", and was subject to stock piling.

The contract was unenforcible, for want of compliance with the Government Property act. What we have said requires affirmance of the judgment of the district court.

Because the facts in *United States* v. *Jones*, 176 F.2d 278, relied upon by plaintiffs, are fundamentally different from those in the case at bar, that case, with its able opinion, is not persuasive here. Among the differences in facts are in the following:

(1) In the *Jones* case the government relied on an error made by its employees which led to the consummation of a sale of surplus property. There was no assertion of lack of authority to make the sale (p. 283 as there was here; (2) after agreeing to buy the material, Jones paid for all of it and sales memoranda were issued to him accordingly; (3) a receipt for his payment as well as bills of sale (form W.A.A.—1(a)) were mailed to Jones.

All of the items sold except a lot of universal gear joints, were delivered to Jones but the government refused to deliver the latter joints. Instead it sued to rescind the sale. The court recognized that in the *Jones* case "there were proper instruments acknowledging transfer of title to the purchaser". Of course the court held, at 289, that, in view of § 25 of the Surplus Property act of 1944, 58 Stat. 780 (which is relevantly the same as § 484 (d) of the General Property act, here relied on by plaintiffs):

"* * * *the very parties with whom the agencies dealt and to whom the instruments were made out*, should be protected if they paid value. No other condition was attached.

"Jones is in this class. He paid value, the price asked. * * *"

The Strategic Materials Act

Equally fatal to plaintiffs' action is the Strategic Materials act, 50 U.S.C.A. 98, *et seq.* Enacted to further the common defense of the country, this act provides for the acquisition and retention of stocks of strategic and critical materials in order to supply the industrial, military and naval needs of the country. It authorizes the Director of the Office of Defense Mobilization to determine what materials are strategic and critical. This act provides that, pursuant to regulations issued by the General Services Administration, material owned or contracted for by the United States or any agency thereof, when determined by such agency to be surplus, shall be transferred to stock piles, provided that any material in contractor inventory is to be exempt from stock piling if the owning agency shall not have taken possession of such inventory. § § 98a, 98b and 98e (a).

Plaintiffs argue that, because regulation No. 1 was not published and because they did not learn of it, their purchase from defendant is not subject to the act itself. It is not denied by plaintiffs that regulation No. 1 was adopted. They say that it was not published. They cite no authority requiring publication. They do not charge that knowledge of the adoption of the regulation or its contents was kept from them by any act or conduct of General Services Administration or any other governmental body or officer. This regulation, in part, listed tungsten as a strategic and critical material. This listing had the effect of applying the Strategic Materials act to the tungsten later bought by plaintiffs.

We hold that, on the facts in this case and the applicable provisions of the Strategic Materials act and regulation No. 1, the tungsten here involved was stock-piled as a strategic and critical material and therefore the sale of it to plaintiffs was and is invalid.

By reply brief plaintiffs for the first time made the contention that there is no evidence in the record that the "Munitions Board [*sic*]" ever determined that tungsten was critical and in what quantities it deemed it critical. They say, in effect, that General Services Administration's so listing it, does not make it so. This matter was not discussed in either plaintiffs' main brief or the defendant's brief herein, and, as pointed out by defendant in oral argument, the introduction of this matter belatedly in the reply brief is in violation of rule 17 (e) of this court. We do not, therefore, express any opinion as to that contention.

Conclusion as to Validity of Contract

The approval of General Services Administration is an integral part of the authority essential to the creation of the alleged contract upon which plaintiffs sued. Without that approval the contract does not exist any more than a three-legged stool can stand when it is built with one leg missing. We hold that, under federal law, the contract beween plaintiffs and defendant was unauthorized and, therefore, was and is unenforcible.

Plaintiffs urge that the facts in this case show that their property was taken for public use without due process or just compensation, relying upon amendments V and XIV of the constitution of the United States. We do not agree with this contention.

AFFIRMED.

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX II

MEMORANDUM OF OPINION.

(Filed Feb. 11, 1957)

Plaintiffs and defendant have filed motions for summary judgment under Rule 56, agreeing there is no genuine issue as to any material fact between the parties, and each seeks summary judgment as a matter of law.

From a consideration of the pleadings, affidavits, briefs and oral arguments had in support of their respective contentions, the court has jurisdiction of the parties and subject matter, and it is proper this matter be decided as a matter of law by summary judgment.

The Tungsten powder in issue was classified material and the property of the United States under contracts of July 6, 1951 and February 13, 1952 between defendant and the Department of Defense.

Defendant, in advertising said powder for sale, was an instrumentality of the United States acting under the authority and direction of the Government Contracting Officer, who erroneously failed to screen the disposition thereof with the General Services Administration, as required by the applicable law and regulations, set forth in defendant's brief.

The burden is on the plaintiffs to substantiate the lawful acquisition of property owned by the United States. Innocent errors and illegal procedures committed by governmental employees and instrumentalities used by the United States do not inure to the benefit of others, nor may they be the basis for creating a liability against the United States or its instrumentalities or be otherwise urged as a concept for requiring the United States to complete a sale and disposition of its property in violation of the pertinent statutes and regulations. To determine otherwise would conclude that erroneous and illegal acts and procedures be substituted for the Congressional intent and the resulting statutes.

Plaintiffs' motion for summary judgment on the law overruled and denied.

Defendant's motion for summary judgment on the law allowed. Defendant to submit proposed findings of fact and conclusions of law on or before the 18th day of February, 1957.

Igoe
Judge, United States District Court.

APPENDIX A.

Sections 301 to 310 inclusive of Title 44, United States Code. (Pertinent parts, set out in full)

Chapter 8B.—FEDERAL REGISTER

§ 301. Custody and printing of Federal documents; "Division" created in Archives Establishment; Director, appointment and compensation.

The Administrator of General Services, acting through a division established by him in the National Archives Establishment, hereinafter referred to as the "Division", is charged with the custody and, together with the Public Printer, with the prompt and uniform printing and distribution of the documents required or authorized to be published under section 305 of this title.

§ 302. Filing documents with "Division"; notation of time; public inspection; transmission for printing.

The original and two duplicate originals or certified copies of any document required or authorized to be published under section 305 of this title shall be filed with the Division, which shall be open for that purpose during all hours of the working days when the Archives Building shall be open for official business. The Administrator of General Services shall cause to be noted on the original and duplicate originals or certified copies of each document the day and hour of filing thereof: *Provided*, That when the original is issued, prescribed, or promulgated outside of the

District of Columbia and certified copies are filed before the filing of the original, the notation shall be of the day and hour of filing of the certified copies. Upon such filing, at least one copy shall be immediately available for public inspection in the office of the Administrator of General Services. The original shall be retained in the archives of the National Archives Establishment and shall be available for inspection under regulations to be prescribed by the Administrator of General Services. The Division shall transmit immediately to the Government Printing Office for printing, as provided in this chapter, one duplicate original or certified copy of each document required or authorized to be published under section 305 of this title. Every Federal agency shall cause to be transmitted for filing as herein required the original and the duplicate originals or certified copies of all such documents issued, prescribed, or promulgated by the agency. (July 26, 1935, ch. 417, § 2, 49 Stat. 500; June 30, 1949, ch. 288, title I, § 104 (a), 63 Stat. 381.)

§ 303. "Federal Register"; printing; contents; distribution; price.

* * *

§ 304. Definitions.

As used in this chapter, unless the context otherwise requires, the term "document" means any Presidential proclamation or Executive order and any order, regulation, rule, certificate, code of fair competition, license, notice, or similar instrument issued, prescribed, or promulgated by a Federal agency; the terms "Federal agency" or "agency" mean the President of the United States, or any executive department, independent board, establishment, bureau, agency, institution, commission, or separate office of the administrative branch of the Government of the United States but not the legislative or judicial branches of the Government; and the term "person" means any individual, partnership, association, or corporation. (July 26, 1935, ch. 417, § 4, 49 Stat. 501.)

§ 305. Documents to be published in Federal Register; comments and news items excluded.

(a) There shall be published in the Federal Register (1) all Presidential proclamations and Executive orders, except such as have no general applicability and legal effect or are effective only against Federal agencies or persons in their capacity as officers, agents, or employees thereof; (2) such documents or classes of documents as the President shall determine from time to time have general applicability and legal effect; and (3) such documents or classes of documents as may be required so to be published by Act of the Congress: *Provided,* That for the purposes of this chapter every document or order which shall prescribe a penalty shall be deemed to have general applicability and legal effect.

* * *

§ 306. Administrative Committee of the Federal Register; establishment and composition; powers and duties.

* * *

§ 307. Filing document as constructive notice; publication in Register as presumption of validity; judicial notice; citation.

No document required under section 305 (a) of this title to be published in the Federal Register shall be valid as against any person who has not had actual knowledge thereof until the duplicate originals or certified copies of the document shall have been filed with the Division and a copy made available for public inspection as provided in section 302 of this title; and, unless otherwise specifically provided by statute, such filing of any document, required or authorized to be published under section 305 of this title, shall, except in cases where notice by publication is insufficient in law, be sufficient to give notice of the contents of such document to any person subject thereto or affected thereby. The publication in the Federal Register of any document shall create a rebuttable presumption

(a) that it was duly issued, prescribed, or promulgated; (b) that it was duly filed with the Division and made available for public inspection at the day and hour stated in the printed notation; (c) that the copy contained in the Federal Register is a true copy of the original; and, (d) that all requirements of this chapter and the regulations prescribed hereunder relative to such document have been compiled with. The contents of the Federal Register shall be judicially noticed and, without prejudice to any other mode of citation, may be cited by volume and page number. (July 26, 1935, ch. 417, § 7, 49 Stat. 502.)

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§ 308. Publication in Register as notice of hearing.

• • •

§ 310. Effective date of section 302; time for publication of Register.

The provisions of section 302 of this title shall become effective sixty days after July 26, 1935, and the publication of the Federal Register shall begin within three business days thereafter: *Provided*, That the appropriations involved have been increased as required by section 309 of this title.

• • •

APPENDIX B.

Section 1001 to 1011 of Title 5, United States Code.
(Pertinent parts, set out in full)

Chapter 19.—ADMINISTRATIVE PROCEDURE

§ 1001. Definitions.

As used in this chapter—

(a) Agency.

"Agency" means each authority (whether or not within or subject to review by another agency) of the Government of the United States other than Congress, the courts, or the governments of the possessions, Territories, or the District of Columbia.

• • •

(c) Rule and rule making.

"Rule" means the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing upon any of the foregoing. "Rule making" means agency process for the formulation, amendment, or repeal of a rule.

§ 1002. Publication of information, rules, opinions, orders and public records.

Except to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of an agency—

(a) Every agency shall separately state and currently publish in the Federal Register (1) * * * and (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules addressed to and served upon named persons in accordance with law. No person shall in any manner be required to resort to organization or procedure not so published.

§ 1003. Rule making.

Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts—

(a) Notice; publication and contents.

General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates th finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) Time of publication or service of rules.

The required publication or service of any substantive rule (other than one granting or recognizing exemption or relieving restriction or interpretative rules and statements of policy) shall be made not less than thirty days prior to the effective date thereof except as otherwise provided by the agency upon good cause found and published with the rule.

APPENDIX C

Subsection (a) to (i) inclusive of Title 40 Section 484, United States Code.

(N.B. Pertinent parts of these sections are set out in full. Emphasis subsection (a), (d) and (i) ours.)

Disposal of surplus property—(a) Supervision and direction.

Except as otherwise provided in this section, the Administrator shall have supervision and direction over the disposition of surplus property. Such property shall be disposed of to such extent, at such time, in such areas, by such agencies, at such terms and conditions, and in such manner, as may be prescribed in or pursuant to this chapter, chapter 11B of Title 5, chapter 4 of Title 41, and chapter 11 of Title 44.

(b) Care and handling.

The care and handling of surplus property, pending its disposition, and the disposal of surplus property, may be performed by the General Services Administration or, when so determined by the Administrator, by the executive agency in possession thereof or by any other executive agency consenting thereto.

(c) Method of disposition.

Any executive agency designated or authorized by the Administrator to dispose of surplus property may do so by sale, exchange, lease, permit, or transfer, for cash, credit, or other property, with or without warranty, and upon such other terms and conditions as the Administrator deems proper, and it may execute such documents for the transfer of title or other interest in property and take such other action as it deems necessary or proper to dispose of such property under the provisions of this subchapter.

(d) Validity of deed, bill of sale, lease, etc.

A deed, bill of sale, lease, or other instrument executed by or on behalf of any executive agency purporting to transfer title or any other interest in surplus property under this subchapter shall be conclusive evidence of compliance with the provisions of this subchapter insofar as concerns title or other interest of any bona fide grantee or transferee for value and without notice of lack of such compliance.

(e) Advertising as prerequisite to disposal.

Unless the Administrator shall determine that disposal by advertising will in a given case better protect the public interest, surplus property disposals may be made without regard to any provision of existing law for advertising until 12 o'clock noon, eastern standard time, June 30, 1953: *Provided,* That an explanatory statement shall be prepared and submitted to the appropriate committees of Congress and a copy preserved in the file of all cases were negotiated disposal occurs.

(f) Contractor inventories.

Subject to regulations of the Administrator, any executive agency may authorize any contractor with such agency or subcontractor thereunder to retain or dispose of any contractor inventory.

(g) Agricultural commodities, foods, and cotton or woolen goods.

The Administrator, in formulating policies with respect to the disposal of surplus agricultural commodities, surplus foods processed from agricultural commodities, and surplus cotton or woolen goods, shall consult with the Secretary of Agricultural.

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(h) Same; transfer to Department of Agricultural for price support or stablization reasons; deposit of receipts, limitation on sale of surplus farm commodities.

Whenever the Secretary of Agricultural determines such action to be required to assist him in carrying out his responsibilities with respect to price support or stablization, the Administrator shall transfer without charge to the Department of Agricultural any surplus agricultural commodities, foods, or cotton or woolen goods to be disposed of.

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(i) Vessels; laws governing sales.

The United States Maritime Commission shall dispose of surplus vessels of one thousand five hundred gross tons or more which the Commission determines to be merchant vessels or capable of conversion to merchant use, and such vessels shall be disposed of only in accordance with the provisions of the Merchant Marine Act, 1936, as amended, and other laws authorizing the sale of such vessels.

APPENDIX D

Subsection (a) of Section 98e of Title 50 United States Code.

(The full text of 98e (a) is here set out. Emphasis is ours on the "Exemption phrase" 98e (a) (1) applicable to the instant case.)

§ 98e. Transfer of surplus materials to stock piles; exceptions; payments; reduction of amount of obligations of Reconstruction Finance Corporation

(a) Pursuant to regulations issued by the General Services Administration, every material determined to be strategic and critical pursuant to section 98a of this title, which is owned or contracted for by the United States or any agency thereof, including any material received from a foreign government under an agreement made pursuant to sections 411, 412, 413-419 of Title 22, or other authority, shall be transferred by the owning agency, when determined by such agency to be surplus to its needs and responsibilities, to the stock piles established pursuant to sections 98-98h of this title, so long as the amount of the stock pile for that material does not exceed the quantities determined therefor pursuant to section 98a of this title. There shall be exempt from this requirement such amount of any material as is necessary to make up any deficiency of the supply of such material for the current requirements of industry as determined by the Secretary of Commerce. There shall

also be exempt from this requirement (1) *any material which constitutes contractor inventory if the owning agency shall not have taken possession of such inventory,* (2)such amount of any material as the Army and Navy Munitions Board determines (i) are held in lots so small as to make the transfer thereof economically impractical; or (ii) do not meet or cannot economically be converted to meet, stock-pile requirements determined in accordance with section 98a of this title. The total material transferred to the stock piles established by sections 98-98h of this title in accordance with this section during any fiscal year beginning more than twelve months after July 23, 1946 shall not exceed in value (as determined by the Secretary of the Treasury on the basis of the fair market value at the time of each transfer) an amount to be fixed by the appropriation Act or Acts relating to the acquisition of materials under sections 98-98h of this title.

APPENDIX E.

(Unpublished Regulation)

GENERAL SERVICES ADMINISTRATION
Washington 25, D. C.

August 14, 1951

Emergency Procurement Regulation No. 1

TO: Heads of Federal Agencies

SUBJECT: Transfer of Excess Strategic and Critical Materials to the Stock Pile

1. Purpose. This Regulation prescribes the policy and general methods for the transfer of excess strategic and critical materials to the stock pile. It is issued pursuant to the provisions of the Strategic and Critical Materials Stock Piling Act (60 Stat. 596; 50 U.S.C. 98-98h), and the Federal Property and Administrative Services Act of 1949, as amended (Public Laws 152 and 754, 81st Congress), and in cooperation with the Munitions Board of the Department of Defense.

2. Definitions.
   a. "Agency" means any agency of the United States, including any executive department or independent establishment in the executive branch of the Government (including any wholly owned Government corporation) or any establishment in the legislative or judicial branch of the Government.
   b. "Contractor inventory" means (1) any property acquired by and in the possession of a contractor or subcontractor (including Government-furnished property) under a contract pursuant to the terms of which title is vested in the Government, and in excess of the amounts needed to complete full performance under the entire contract; and (2) any property which the Government is obligated or has the option to take over under any type of contract as a result either of any changes in the specifications or plans thereunder or of the termination of such contract (or subcontract thereunder), prior to completion of the work, for the convenience or at the option of the Government.
   c. "Excess", with respect to strategic materials, means any such property under the control of any agency which is not required for its needs and the discharge of its responsibilities, as determined by the head thereof.
   d. "Holding agency" means any agency having accountability for strategic materials.
   e. "Strategic materials" means material determined to be strategic and critical by the Munitions Board pursuant to the Strategic and Critical Materials Stock Piling Act, a list of such materials being appended hereto as Appendix A.
3. Reports of Excess to the General Services Administration.

a. General Requirement of Reporting. All strategic Appendix A, when determined to be excess, shall be reported by the holding agency to the Administration for the purpose of determining disposition either by transfer to the General Services Administration for stock piling or by other transfer or disposal. Unless otherwise directed by the Administration in specific cases, holding agencies shall not be required to determine prior to such report whether such strategic materials meet Munitions Board specifications.

b. Reporting Less than Specified Quantities. Subject to paragraphs (1) and (2) of this subsection b., each holding agency having excess strategic materials at any one location in lots less than the minimum quantities specified in Appendix A shall retain such materials until the specified minimum is accumulated and thereafter shall report such materials to the Administration as provided in this Regulation.

(1) Whenever a holding agency has excess strategic materials at any one location in lots of 50 per cent or more of the minimum quantities specified in Appendix A, and such holding agency determines that there is no reasonable prospect of accumulating, within 12 months, the minimum quantities specified, it shall report such materials to the Administration for determination of suitability for the stock pile.

(2) Whenever a holding agency having excess strategic materials at any one location in lots of less than 50 per cent of the minimum quantities specified in Appendix A determines that

there is no reasonable prospect of accumulating, within 12 months, strategic materials in the amount of 50 per cent of the minimum quantities specified in Appendix A, it shall report and dispose of such excess in accordance with the provisions of general Services Administration Personal Property Management Regulation No. 3, Revised.

c. Form of Reports. Holding agencies shall file reports of excess strategic materials with the Administration on Standard Form 125, Report of Strategic and Critical Materials, and Standard Form 125a, Continuation Sheet, in accordance with the instructions set forth in Appendix B of this Regulation.

d. Contractor Inventory. Each agency having strategic materials in contractor inventory which are determined to be excess to the needs of the agency, shall report such materials in the manner prescribed by this Regulation. In the case of contractor-owned contractor inventory, compliance with the reporting requirements of this Regulation should ordinarily occur prior to exercising the applicable option to take over such property. When after reporting such property, the strategic materials are determined suitable for stock piling, the contracting agency shall take the necessary action to acquire title for the Government and shall transfer such property to the General Services Administration for stock piling, in accordance with Section 4 of this Regulation.

4. Transfers to the Stock Pile.

a. General. Excess strategic materials reported to the Administration, which are determined by the Administration to be suitable for stock piling,

shall be transferred to the General Services Administration for stock piling in accordance with this Regulation.

b. Unsuitable Items. Excess strategic materials reported to the Administration which are determined by the Administration to be unsuitable for stock piling or which cannot economically be converted to meet stock pile requirements shall, after notification of such determination, be reported and disposed of in accordance with the provisions of General Services Administration Personal Property Management Regulation No. 3, Revised.

c. Withdrawals. Subject to the approval of the Administration, holding agencies may withdraw, for their own use, excess strategic materials reported by them to the Administration, provided that, prior to the withdrawal request, such excess strategic materials have not been incorporated in the stock pile, as determined by the Administration.

d. Reimbursement. Transfers of excess strategic materials to the General Services Administration for stock piling shall be made without reimbursement or transfer of funds, except as provided herein. All expenses of preparation for shipment, all shipping and conversion expenses and all expenses after the date of shipment (including transportation, maintenance and storage) which are incident to the transfer of excess strategic materials to the General Services Administration for stock piling may be paid from funds appropriated pursuant to the Strategic and Critical Materials Stock Piling Act unless the holding agency elects to bear such expenses.

5. Regulations and Orders of Other Agencies. In taking

action pursuant to this Regulation, consideration must be given to applicable regulations and orders of other Government agencies, such as the National Production Authority.

6. Exceptions and Deviations. Exceptions from any portion of this Regulation and deviations from any mandatory forms prescribed hereby shall be permitted only by direction of the Administrator.
7. Rescission of Regulations. War Assets Administration Regulation No. 17, dated April 26, 1949, and all orders issued thereunder, are hereby rescinded and reference to such Regulation No. 17 in other regulations or instructions, where applicable, shall be deemed to be references to this Regulation.
8. Effective Date. This Regulation shall become effective September 14, 1951.

Russell Forbes
Russell Forbes
Acting Administrator

APPENDIX F.

Amendment V of the Constitution of the United States (excerpt):

"No person shall be • • • deprived of • • • property without due process of law; nor shall private property be taken for public use, without just compensation."